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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DILLARD MCNELEY, Plaintiff and Appellant, v. SWIFT TRANSPORTATION CO. OF ARIZONA, LLC, Defendant and Respondent.	B243769 (Los Angeles County Super. Ct. No. BC464787)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Affirmed.

Dillard McNeley, in pro. per., for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Jason W. Kearnaghan, Melanie M. Hamilton and Karin Dougan Vogel for Defendant and Respondent.

Plaintiff and appellant Dillard McNeley appeals from the judgment entered after the trial court granted summary judgment in this employment action in favor of defendant and respondent Swift Transportation Co. of Arizona, LLC.[1] McNeley makes only one argument on appeal—he contends the trial court erred in granting summary judgment of his wrongful termination cause of action because after his doctor wrote that he needed a 90-day leave of absence due to stress, Swift prepared a personal leave of absence form granting only a 30-day leave, which McNeley did not request or sign. McNeley characterizes the Swift form as "fraudulent" and contrary to the terms of his employment agreement, resulting in his unlawful employment termination when he did not return to work after 30 days. We affirm.

BACKGROUND

McNeley filed the operative first amended complaint alleging seven causes of action. However on appeal, he challenges only the trial court's ruling as to the second cause of action for wrongful termination in violation of public policy.[2] McNeley alleged he was hired as a truck driver by Swift on October 18, 2008, where he remained until September 2009, when he was wrongfully terminated. On July 19, 2009, McNeley requested to see the company doctor for back pain, but his supervisor angrily told McNeley to get off the property or he would be arrested. Swift sent McNeley a separation letter falsely stating that McNeley had quit his job on or about September 28, 2009. McNeley was wrongfully terminated based on unlawful discrimination,

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[1] Swift was erroneously sued as Swift Transportation, Inc.

[2] The six other causes of action were for: violation of the Fair Employment and Housing Act (FEHA)(Gov. Code, § 12940 et seq); failure to pay wages and overtime compensation due (Lab. Code, §§ 204, 510, 1194); race discrimination, disability discrimination, and retaliation in violation of the FEHA; and breach of contract. We do not detail the allegations regarding the causes of action not in issue on appeal.

harassment, and retaliation in violation of the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) (FEHA).

Swift's Motion for Summary Judgment

Swift contended McNeley could not prevail on his claim of wrongful termination because McNeley was not terminated, but instead he voluntarily abandoned his job. Swift further contended that McNeley was not qualified to work as a driver, based on his deposition testimony that he no longer had a truck driver license and his doctor said he could never work again as a driver. Swift submitted the following undisputed material facts in support of summary judgment or summary adjudication of the wrongful termination cause of action.

When Swift hired McNeley in October 2009, McNeley received and acknowledged Swift's Driver Manual and agreed to abide by its policies. The Driver Manual provided that McNeley was an at-will employee who could be terminated at any time. The Driver Manual explains that an employee must be employed for 12 months in order to be eligible for protected leave under the Family and Medical Leave Act (29 U.S.C § 2611(2)(A)) or the California Family Rights Act (Gov. Code, § 12945.2, subd. (a).)

McNeley's doctor submitted a disability leave request for the period of December 22, 2008, through March 22, 2009, for stress stemming from McNeley's prior employment. Swift granted McNeley the 90-day leave of absence. McNeley returned to work on January 29, 2009, before the three-month leave expired.

On July 17, 2009, McNeley submitted a second request for a three-month absence, again based on stress. At that time, McNeley had been employed by Swift for only nine months.

On July 23, 2009, Swift sent McNeley a letter advising him that he had been placed on a 30-day personal leave of absence until August 17, 2009, instructing him to communicate weekly with his manager and inform the manager of his date of return. The

letter warned McNeley that failure to return to work on August 17 would be considered a voluntary resignation.

McNeley did not communicate with his manager during his leave and did not appear for work on his August 17 return date. McNeley was advised by letter from Swift on September 10, 2009, that if he did not contact Swift by September 18, 2009, he would be deemed to have voluntarily resigned his employment under Swift's universally applied policy. McNeley did not respond to the letter. Swift sent McNeley a separation notice on September 28, reflecting that he voluntarily resigned his employment following the expiration of his 30-day leave of absence.

Swift's policy allowed for an unpaid leave of absence of up to 30 days. The Driver Manual stresses the importance of the employee keeping in touch with the manager during leave and giving notice of any change in the return date.

The Driver Manual sets forth a policy that if the employee does not return to work on the scheduled return date, the employee will be deemed to have voluntarily resigned. Swift's policy is to consider employees to have abandoned their jobs after three days of not communicating with Swift.

Swift also argued McNeley could not prevail on his wrongful termination claim because McNeley admitted he was physically unable to work and therefore did not suffer any harm as a result of Swift's action. McNeley testified in his deposition that he was physically incapable of working as a truck driver since July 16, 2009, because of a back injury.

McNeley's Opposition to the Motion

McNeley's opposition consisted of 14 pages of argument, and the attachment of approximately114 pages of documents and the lodging of a DVD. The opposition and attached documents were not in the form required by Code of Civil Procedure

section 473c, subdivision (b)(3).[3] The opposition admitted McNeley was hired as an at-will employee in October 2008 and received a copy of the Driver Manual at that time. McNeley's doctor wrote a note dated July 17, 2009, "requesting a 90-day leave [for emotional stress], therefore [McNeley] did not need a company personal leave of absence." It is untrue that McNeley abandoned his job or that he voluntarily resigned.

Swift's Rely to the Opposition

Swift argued that McNeley's opposition presented no evidence of a material disputed fact, nor did it submit substantial responsive evidence. McNeley made no attempt in the opposition to dispute any fact set forth in Swift's separate statement of undisputed facts. Citing Code of Civil Procedure section 437c, subdivision (b)(3) and *Oldcastle Precast , Inc. v. Lumbermens Mutual Casualty Co*. (2009) 170 Cal.App.4th 554, 575-577, Swift argued that McNeley's failure to file a responsive separate statement was ground alone to grant the motion.

Swift reiterated that McNeley admitted he was an at-will employee with less than one year on the job and therefore not entitled to protected leave under federal or state law. McNeley offered no evidence that the 30-day leave request was forged and should have been for 90 days. He did not communicate with his manager at the end of 30 days and did not return to work. He produced no evidence that he was treated any differently

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[3] Code of Civil Procedure section 437c, subdivision (b)(3), provides as follows: "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."

from any other similarly situated employee, or that his race had anything to do with the determination McNeley had abandoned his job.

Swift also filed evidentiary objections to McNeley's evidence and his declaration in opposition to summary judgment.

Rulings of the Trial Court

After receiving supplemental briefing on a cause of action not relevant to this appeal, the trial court sustained objections to the bulk of McNeley's evidence and granted summary judgment in favor of Swift. McNeley filed a timely notice of appeal.

DISCUSSION

McNeley raises only one issue on appeal. He argues there are triable issues of material fact as to his wrongful discharge cause of action because he did not fill out or sign the request for leave form that was the basis for Swift's conclusion that McNeley had voluntarily resigned when he did not return to work after the 30-day leave.

McNeley reasons as follows: his doctor provided a note stating McNeley required a 90-day medical leave of absence for "emotional stress"; instead of granting the request, Swift prepared and approved a leave of absence form for only 30 days; although there is a line for the employee to sign on the leave of absence form, McNeley did not sign it and the line for his signature indicates "cannot reach driver"; and the "fraudulent" leave of absence form was in violation of Swift policy and could not be a valid basis to terminate his employment on the grounds he had voluntarily resigned.

Standard of Review

"'We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.) We make "an independent

assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* [(2001)] 25 Cal.4th 826, 849, 853.)' (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217.)" (*Ontiveros v. 24 Hour Fitness USA, Inc.* (2008) 169 Cal.App.4th 424, 429.)

Analysis

McNeley had been employed by Swift for less than 12 months at the time he requested the 90-day leave of absence. Because McNeley was employed by Swift for less than 12 months, he was not entitled to medical leave under the provisions of either the federal Family and Medical Leave Act or the California Family Rights Act.

Accordingly, the lawfulness of Swift's determination that McNeley abandoned his position when he did not communicate with his manager or return to work after the approved leave is controlled by the terms set forth in the Driver Manual and the FEHA. "When an employer promulgates formal personnel policies and procedures in handbooks, manuals, and memoranda disseminated to employees, a strong inference may arise that the employer intended workers to rely on these policies as terms and conditions of their employment, and that employees did reasonably so rely. (See, e.g., *Scott* [*v. Pacific Gas & Electric Co.* (1995)] 11 Cal.4th 454, 465.) Both parties derive benefits from such an arrangement. From the employees' perspective, formal policies promote fairness and consistency, guarding against the arbitrary, capricious, and incongruous treatment of

similar cases. By the same token, such policies may also help the employer by enhancing worker morale, loyalty, and productivity, providing competitive advantage in the labor market, and minimizing employee litigation. (See *id.*, at pp. 469-470; see also *Foley* [*v. Interactive Data Corp.* (1988)] 47 Cal.3d 654, 681.)" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 344-345.)

The primary argument put forth by McNeley on appeal is that he did not fill out or sign the form that granted him the 30-day leave. Relying on wholly inapposite cases involving the parties to sign a settlement agreement in order for it to be summarily enforced under Code of Civil Procedure section 664.6, McNeley reasons that the absence of his signature on the form makes it unenforceable and therefore it could not be the basis for Swift's ultimate conclusion that McNeley abandoned his employment.

McNeley's reliance on Code of Civil Procedure section 664.6 is totally without merit. Section 664.6 provides in pertinent part that "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." Quite obviously, the section has nothing to do with the contents of an employee's request for a leave of absence or an employer's grant of a leave of absence. What McNeley overlooks in this case is that he requested the 90-day leave of absence through his doctor. There is nothing in the Driver Manual that required McNeley to personally sign the form. The absence of McNeley's signature on the form does not indicate he did not request a leave of absence. If anything, McNeley's unavailability to sign the form demonstrates his failure to cooperate with Swift in connection with the leave of absence.

In terms of the length of the leave of absence that was granted by Swift, the Driver Manual contains the controlling rules. For example, the manual provides that "Swift may grant an unpaid personal leave of absence of up to thirty [(30)] days per 12-month period for certain circumstances." In addition, the Driver Manual provides that it "is important to keep in touch with your Driver Manager during your leave, and to give prompt notice if there is any change to your return date. If you do not return to work on your scheduled

return date, you will be considered as having voluntarily resigned your position with the company."

Thus, Swift followed its own written policies, to which McNeley had agreed as a condition of his at-will employment, by granting a 30-day leave of absence. While McNeley's doctor had written that McNeley required a 90-day leave, Swift was not obligated by statute or contract to grant an accommodation of a leave of more than 30 days. Moreover, Swift did not foreclose a leave longer than 30 days. Swift fixed a period of 30 days leave, consistent with the terms of the Driver Manual, and stressed to McNeley the importance of keeping in touch with his Driver Manager during the leave.

An employer has the ultimate discretion to choose between effective accommodations, and an employee cannot force the employer to provide a specific accommodation. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1194; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 228.) In accommodating McNeley's request for leave, Swift had the right to choose an effective accommodation of 30 days, without foreclosing the possibility of a longer leave, if shown to be necessary. Considering that Swift had granted McNeley a 90-day leave in December 2008, and McNeley returned earlier than expected, it was entirely reasonable to begin with the 30-day leave authorized in the Driver Manual and proceed from there to determine if any further accommodation was warranted.

While Swift took steps to participate in an interactive process of accommodation by granting the 30-day leave and advising McNeley to stay in touch with his Driver Manager, McNeley ignored the process by failing to ever respond. "[I]t is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 266.) "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the

party who fails to participate in good faith." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 62, fn. 22.)

McNeley made no contact with the Driver Manager. By failing to contact the Driver Manager, McNeley made it impossible for Swift to assess whether accommodation with the grant of additional leave was appropriate. It was not until September 28, 2009—well after the 30-day leave of absence had expired—that Swift enforced the provision in the Driver Manual that deemed McNeley to have abandoned his job by failing to either report to work or communicate with the Driver Manager. These undisputed facts demonstrate that McNeley could not prevail on his wrongful termination claim.

Swift is also correct that McNeley cannot show any harm resulting from his discharge, or from the reduction in the length of his request for leave, because McNeley was physically unable to work as a truck driver since July 16, 2009, due to a back injury. McNeley testified in deposition that he had never been released to work by his doctors, his truck driver license was expired, and his doctor said he is unable to perform the duties of a truck driver, "or anything like that again."

"The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. (*Jensen v. Wells Fargo Bank*[, *supra*,] 85 Cal.App.4th [at p.] 256.)" (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.) McNeley's testimony unequivocally demonstrated he was not a qualified individual because he could not perform the function of a truck driver at the time he was granted a leave up until his deposition, or ever again, and McNeley cannot show damages in connection with his wrongful termination claim.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Swift Transportation Co. of Arizona, LLC.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.